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ROBINSON, MCFADDEN & MOORE, P.C.

COLUMBIA, SOUTH CAROLINA

Frank R. Ellerbe, III

1901 MAIN STREET, SUITE 1200

COLUMBIA, SOUTH CAROLINA 29202

803) 252-0724 | (803) 744-1556 direct

fellerbe@robinsonlaw.com

Time:

March 9, 2007

VIA HAND DELIVERY

The Honorable Barbara A. Scott Richland County Clerk of Court 1701 Main Street, Rm 205 Columbia, SC 29201-2819

Time Warner Cable Information Services (South Carolina), LLC v.

Farmers Telephone Cooperative, Inc., et al.

Case No. 2005-CP-40-5687

Dear Ms. Scott:

Enclosed for filing please find a copy of the Notice of Appeal on behalf of Time Warner Cable Information Services (South Carolina), LLC which is being filed with the SC Court of Appeals today. Please clock in the extra copy provided and return it with our courier.

If you have any questions, please call.

Yours truly,

ROBINSON, McFADDEN & MOORE, P.C.

Frank R. Ellerbe. III

/tch

Enclosures

cc/enc:

M. John Bowen, Jr., Esquire

Margaret M. Fox, Esquire

Florence Belser, General Counsel ORS

Hon. Charles Terreni, SC Public Service Commission

Julie Patterson, Esquire (via email)

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ATTORNEYS AND COUNSELORS AT LAW

March 9, 2007

Frank R. Ellerbe, III

COLUMBIA, SOUTH CAROLINA

1901 MAIN STREET, SUITE 1200

POST OFFICE BOX 944

COLUMBIA, SOUTH CAROLINA 29202

PH (803) 779-8900 | (803) 227-1112 direct

FAX

(803) 252-0724 | (803) 744-1556 direct

VIA HAND DELIVERY

The Honorable Kenneth A. Richstad, Clerk of Court South Carolina Court of Appeals 1015 Sumter Street Columbia, SC 29201

Farmers Telephone Cooperative, Inc., et al.

Case No. 05-CP-40-5687

Dear Mr. Richstad:

Enclosed for filing please find the Notice of Appeal on behalf of Time Warner Cable Information Services (South Carolina), LLC ("TWCIS") in the above-referenced matter and a copy of the order on appeal. Since the transcript of the Public Service Commission hearing has already been provided to the parties of record, TWCIS does not intend to order a transcript of the appellate argument heard by Judge G. Thomas Cooper, Jr. Also enclosed is this firm's check in the amount of \$100 for the filing fee requirement.

Yours truly,

ROBINSON, McFadden & Moore, P.C.

Frank R. Ellerbe, III

/tch

Enclosures

cc w/enc:

M. John Bowen, Jr., Esquire

Margaret M. Fox, Esquire

Florence Belser, General Counsel ORS

Hon. Charles Terreni, SC Public Service Commission

Julie Patterson, Esquire (via email)

THE STATE OF SOUTH CAROLINA In The Court of Appeals

APPEAL FROM RICHLAND COUNTY Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2005-CP-40-5687

S. C. PUBLIC SZAPILLA SALAN SA

Time Warner Cable Information Services (South Carolina), LLC......

Petitioner,

٧.

Farmers Telephone Cooperative, Inc.;

Fort Mill Telephone Co.; Home Telephone Co.,

Inc.; PBT Telecom, Inc.; St. Stephen Telephone Co.; South Carolina Telephone Coalition; and

Office of Regulatory Staff......Respondents.

NOTICE OF APPEAL

Time Warner Cable Information Services (South Carolina), LLC ("TWCIS") in Civil Action No. 2005-CP-40-5687 hereby appeals the order of the Honorable G. Thomas Cooper, Jr. dated February 5, 2007, dismissing the appeal of TWCIS and affirming the Orders of the Public Service Commission of South Carolina (Orders No. 2005-412 (August 1, 2005) and 2005-484 (September 26, 2005). A

copy of Judge Cooper's February 5, 2007, order is attached. Appellant received written notice of entry of Judge Cooper's order on February 8, 2007.

Dated this 9th day of March, 2007.

ROBINSON, McFADDEN & MOORE, P.C.

Frank R. Ellerbe, III Bonnie D. Shealy Post Office Box 944

Columbia, South Carolina 29202

Telephone (803) 779-8900

<u>fellerbe@robinsonlaw.com</u> <u>bshealy@robinsonlaw.com</u>

Attorneys for Appellant Time Warner Cable Information Services (South Carolina), LLC.

M. John Bowen, Jr., Esquire Margaret M. Fox, Esquire McNair Law Firm, P.A. Post Office Box 11390 Columbia, South Carolina 29211 Telephone (803) 799-9800

Attorneys for Respondents Farmers Telephone Cooperative, Inc.; Fort Mill Telephone Co.; Home Telephone Co., Inc.; PBT Telecom, Inc.; St. Stephen Telephone Co.; and South Carolina Telephone Coalition

Florence Belser, General Counsel Office of Regulatory Staff Post Office Box 11263 Columbia, South Carolina 29211 Telephone (803) 737-0853

Attorney for Respondent Office of Regulatory Staff

FORM 4

STATE OF	SOUTH CAROLINA	JUDGMENT IN A CIVIL CASE	
COUNTY OF IN THE COU	RICHLAND RT OF COMMON PLEAS	CASE NO. 05-CP-40-5687	
Time	Varner Cable	PSC. &SC	
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PLAINTIFF(S)		DEFENDANT(S)	
CHECK ONE	:		
	JURY VERDICT. This action came have been tried and a verdict rendered		
[]	DECISION BY THE COURT. This The issues have been tried or heard as	s action came to trial or hearing before the cource and a decision rendered.	
[]	ACTION DISMISSED (<u>CHECK RE</u> SCRCP (Vol. Nonsuit); [] Rule 43(k	E4SO.V): [] Rule 12(b), SCRCP; [] Rule 41(a),), SCRCP (Settled): [] Other	
[]	ACTION STRICKEN (<u>CHECK REASON</u>): [] Rule 40(j) SCRCP; [] Bankruptcy; [] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [] Other		
IT IS ORDE	RED AND ADJUDGED: [Jee att	tached order: [] Statement of Judgment by the Court:	
·			
Dated at	Cola South Carolina	a, this 5% day of 4% , 20% .	
		PRESIDING JUDGE	
This judgmen	at was entered on the day of	. 20, and a copy mailed first class this	
day of	Full . 2007 to attorneys	of record or to parties (when appearing pro se) as follows:	
B. St	realy	M. Fox	
<u>D'</u>	[ROW]	J. Bowen	
		F. Belser	
ATTORNEY	(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)	
		s/BARBARA A. SCOTT	

CLERK OF COURT

MAS

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2005-CP-40-5687
Time Warner Cable Information Services (South Carolina), LLC,) Petitioner,)	70 E
v.)	RICHLA 2007 FEB BARGA C.C
Public Service Commission of South Carolina, Farmers Telephone Cooperative, Inc., Fort Mill Telephone Co., Home Telephone Co., Inc., PBT Telecom, Inc., St. Stephen Telephone Co., South Carolina Telephone Coalition, and Office of Regulatory Staff,	AND COUNTY FILED 8-5 PM 3: 34 C.C. & G.S.
Respondents.)	

ORDER AFFIRMING ORDERS OF THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

(Proposed Order of Respondents Farmers Telephone Cooperative, Inc., Fort Mill Telephone Co., Home Telephone Co., Inc., PBT Telecom, Inc., St. Stephen Telephone Co., and South Carolina Telephone Coalition)

This matter is before this Court by way of an appeal filed by Time Warner Cable Information Services (South Carolina), LLC ("TWCIS") in response to orders issued by the Public Service Commission of South Carolina ("the Commission"), denying TWCIS' request to expand its Certificate of Public Convenience and Necessity ("Certificate") in order to provide certain services in specified rural areas within the State of South Carolina. TWCIS seeks judicial review of Commission Order Ruling on Expansion of Certificate (Order No. 2005-412, dated August 1, 2005), as well as Commission Order Denying Rehearing or Reconsideration of Order No. 2005-412 (Order No. 2005-484, dated September 26, 2005). The matter was heard by this



BACKGROUND

In 2003, TWCIS sought a Certificate to provide facilities-based Voice-over Internet Protocol ("VoIP") services throughout the State of South Carolina. The South Carolina Telephone Coalition ("SCTC"), an organization of rural local exchange telephone companies, intervened in the proceeding and prefiled testimony raising a number of concerns. TWCIS and SCTC later entered into a stipulation whereby TWCIS would not offer its VoIP services in areas where incumbent rural local exchange carriers held rural exemptions pursuant to 47 U.S.C. § 251(f)(1) and, further, would not offer its VoIP services until after July 1, 2004, in those rural areas where the incumbent local exchange carriers had terminated rural exemptions. The Commission granted TWCIS limited authority to offer its VoIP services within the State subject to the restrictions set forth in the stipulation. Order No. 2004-213, dated May 24, 2004.

On October 1, 2004, TWCIS petitioned to expand its existing authority in order to provide its VoIP service in the areas served by ALLTEL South Carolina, Inc. ("ALLTEL"), which service areas had been subject to the earlier stipulation. See Docket No. 2004-279-C. ALLTEL did not oppose the expansion by TWCIS into its service area, and the Commission entered an order approving TWCIS' Application without a hearing. Order No. 2005-385(A), dated July 20, 2005.

Also on October 1, 2004, TWCIS filed an Application, which is the subject of this action, seeking to expand its authority to provide VoIP service in those areas currently served by Respondents Farmers Telephone Cooperative, Inc. ("Farmers"), Fort Mill Telephone Co. ("Fort Mill"), Home Telephone Co., Inc. ("Home"), PBT Telecom, Inc. ("PBT"), St. Stephen Telephone Co. ("St. Stephen") (collectively "RLECs"). The matter was designated as Docket



No. 2004-280-C, and the Commission held a hearing to determine the merits of the Application. After the hearing, the Commission issued an Order denying TWCIS' request for certification due to "failure of proof" with respect to TWCIS' original Application. Order No. 2005-412, dated August 1, 2005, at 5. The Commission later denied TWCIS' request for reconsideration of Order No. 2005-412, and again stated that there was "a failure of proof with respect to the original Application," noting that this finding was "clearly supported by the evidence of record." Order No. 2005-484, dated September 26, 2005, at 2.

In its Petition for Judicial Review, TWCIS argues that the Commission erred in finding that a "failure of proof" existed regarding its original Application. In addition, TWCIS contends that the Commission violated state and federal law to the extent that TWCIS was required to obtain a waiver of RLECs' rural exemptions in order to expand its authority into the RLEC areas and, further, that the Commission erred in finding that no Certificate was required in order for TWCIS to obtain interconnection rights with RLECs. TWCIS also contends the Commission's decisions prohibit or have the effect of prohibiting TWCIS' ability to provide telecommunications service in the RLEC areas.

STANDARD OF REVIEW

In reviewing a final agency decision, the Circuit Court essentially sits as an appellate court to review the alleged errors committed by the agency. Kiawah Resort Assocs. v. South Carolina Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995). Under the judicial review standard enunciated in S.C. Code Ann. § 1-23-380(A)(6), the Circuit Court should not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, and must affirm the Commission's decision unless it is affected by error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See Heater of Seabrook, Inc. v.



Public Service Comm'n, 324 S.C. 56, 60, 478 S.E.2d 826, 828 (1996). The party challenging the Commission's order bears the burden of proving convincingly that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. <u>Id</u>. Substantial evidence is

"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, 276 S.C. 130, 135, 276 S.E.2d 304, 307 (1981) (citations omitted).

FINDINGS AND CONCLUSIONS

The Commission's decision that TWCIS failed to comply with the applicable statutory provisions required for certification is supported by reliable, probative, and substantial evidence on the whole record, is not affected by an error of law, and is not arbitrary and capricious.

- A. Substantial Evidence Exists in the Record to Support the Commission's Denial of TWCIS' Request for Certification in RLEC Areas on the Grounds of "Failure of Proof."
 - 1. Evidence of record supports the Commissions' finding of "failure of proof' because of major discrepancies in TWCIS' Application, pre-filed testimony, and testimony as presented during the hearing.

The Commission's finding that a failure of proof existed with respect to TWCIS' original Application is clearly supported by the evidence of record. The Commission was understandably confused as to exactly what services TWCIS proposed to provide, because TWCIS repeatedly changed its position. In its Application filed in 2004, TWCIS described the VoIP services for which it requested certification in RLEC areas as follows: "TWCIS plans to provide facilities-based local and long distance Internet protocol ("IP") voice service, targeted to the residential market in [RLECs'] service areas...." TWCIS Application at ¶ 9. Although TWCIS did not

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amend its Application, it sought different authority in its testimony prefiled in support of its Application:

Since the Vonage Order preempts the state from imposing certification and tariffing requirements, TWCIS intends to withdraw the retail service offerings in its current tariff once a new non-regulated entity is created to provide the retail voice services currently being offered by TWCIS. TWCIS intends to remain a certificated carrier and will obtain interconnection service from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity.

TR at 16 (emphasis added).

At the hearing, TWCIS once again changed its description of the services for which it was seeking certification, by making vague references to seeking authority to provide "telecommunications services" as a "full-fledged CLEC." See, e.g., TR at 119. Although it was clear that TWCIS wanted the right to *obtain* interconnection from the RLECs, it was not as clear to the Commission what services TWCIS was seeking to *provide* as a telecommunications service provider.

As the Commission stated in its Order Denying Rehearing or Reconsideration, "it is still not clear exactly what authority TWCIS is seeking" to provide. Order No. 2005-484 at 3. However, viewing Ms. Patterson's testimony along with the Application, substantial evidence exists in the record to support the Commission's finding that TWCIS appeared to be seeking only authority to enter into negotiations toward interconnection agreements with the RLECs. See Order No. 2005-412 at 5. Specifically, it appears that TWCIS was interested in receiving certification as a telecommunications carrier so that it could obtain network interconnection and other services from incumbent local exchange carriers like the RLECs. TWCIS would then provide those functionalities to its soon-to-be-created non-regulated entity, which would provide

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the IP local telephone service to end users.1

Commission rules require that "Applications shall state clearly and concisely the authorization or permission sought...." S.C. Code Ann. Regs. 103-834.A. TWCIS' application did not comply with the regulation, leading the Commission to state: "Time Warner's [TWCIS'] position in this case is confusing, to say the least." Order No. 2005-412 at 5. TWCIS never sought to amend its original Application except on a *de facto* basis through testimony, which itself was vague and unclear. The testimony presented by an SCTC witness properly questioned the services TWCIS intended to provide:

[I]t is not clear to me what TWCIS is seeking from the Commission. On the one hand, TWCIS indicates that it will voluntarily comply with all applicable rules of the Commission, at least until such time as all appeals associated with the Vonage proceeding have been decided. On the other hand, TWCIS intends to move its retail VoIP services to a non-regulated entity where I presume these services will no longer be bound by Commission rules and regulations. It would appear that TWCIS wants to have its cake and eat it too. By agreeing to voluntarily comply with Commission rules and regulations, TWCIS hopes to receive its expanded authority as a telecommunications provider. Having such authority will allow it to seek interconnection with the Rural LECs and request local number portability ("LNP"). Once it obtains interconnection and LNP, TWCIS will then offer a wholesale VoIP service to the newly created nonregulated entity that will then sell VoIP service to retail customers, without having to worry about complying with any Commission rules or regulations.

TR at 139. Based upon the evidence in the record, the Commission properly found that TWCIS failed to comply with the regulation. See Order No. 2005-484 at 2-3.

¹ See, e.g., TR at 8-9 ("One reason we want to be certified is . . . we want to be able to negotiate Interconnection Agreements"); TR at 16 ("TWCIS intends to remain a certificated carrier and will obtain interconnection services from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity"); TR at 38 ("At this point, we seek to obtain interconnection agreements and provide wholesale services to ourselves and to others and to tariff a wholesale offering"); TR at 56 ("We seek to provide a variety of non Internet protocol format telecommunications services in order to provide retail VoIP services and other services throughout the state of South Carolina") (emphasis added); TR at 56-57 ("[R]eally what we're looking to do here is to be able to step in and provide all of those transport and other telecommunications services that you show on the board that are provided [to TWCIS] today by MCI"); TR at 70 ("We need certification in order to obtain interconnection rights"); TR at 128 ("What we seek through this proceeding is the ability on our own, as full-fledged telecommunications carriers to obtain interconnection agreements on our own").



TWCIS further failed to comply with applicable statutory criteria in that it neglected to file an informational tariff describing the proposed services, terms, conditions, and rates. See S.C. Code Ann. § 58-9-280(B). Instead, TWCIS incorporated by reference in its Application the current VoIP retail residential services tariff, see TWCIS Application at ¶ 9, while subsequently testifying that the services listed in the tariff on file with the Commission were not the same services for which it sought certification:

Since the Vonage Order preempts the state from imposing certification and tariffing requirements, TWCIS intends to withdraw the retail service offerings in its current tariff once a new non-regulated entity is created to provide the retail voice services currently being offered by TWCIS. TWCIS intends to remain a certificated carrier and will obtain interconnection service from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity.

TR at 16 (emphasis added). The result is that TWCIS never provided an informational tariff describing the services that it sought certification to provide, as required by law.

2. Contrary to TWCIS' contention, there was conflicting testimony regarding whether TWCIS met the statutory certification requirements.

TWCIS' testimony addressed each of the statutory requirements needed for certification. TWCIS Petition for Judicial Review at ¶ 16 at 6-7. TWCIS' argument ignores the fact that TWCIS did not present the only testimony in this proceeding, and there was substantial evidence in the record to support a finding that TWCIS did not meet the statutory requirements for certification.

South Carolina law provides a detailed description of the statutory duties and obligations of the PSC with respect to telephone utilities and issuance of certificates to provide services:

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² This section provides, in relevant part: "In its application for certification, the applicant seeking to provide the service shall set forth with particularity the proposed geographic territory to be served, and a price list and informational tariff regarding the types of local exchange and exchange access services to be provided."

In determining whether to grant a certificate under this subsection, the commission may require, not inconsistent with the federal Telecommunications Act of 1996, that the:

- (1) applicant show that it possesses technical, financial, and managerial resources sufficient to provide the services requested;
- (2) service to be provided will meet the service standards that the commission may adopt;
- (3) provision of the service will not adversely impact the availability of affordable local exchange service;
- (4) applicant, to the extent it may be required to do so by the commission, will participate in the support of universally available telephone service at affordable rates; and
- (5) provision of the service does not otherwise adversely impact the public interest.

S.C. Code Ann. § 58-9-280(B)(1)-(5) (Supp. 2005). While it is true that TWCIS witness Julie Patterson testified that TWCIS met these standards, there was substantial evidence in the record that the requirements were not met. See, e.g., TR at 144 ("[O]nce TWCIS moves its retail service offering to a new, non-regulated entity, the Commission will have no way of monitoring the quality or price of the service."); TR at 145 ("Ms. Patterson appears to ignore the fact that most, if not all of the subscribers residing in the areas served by the Rural LECs already have access to a competitive service, wireless. As the FCC stated in a 2004 proceeding [citation omitted] 'the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.""); TR at 150-51 ("Allowing Time Warner to provide its service to customers residing in the more densely populated areas of the rural LECs' service areas will eventually cause erosion to the level of contribution that currently allows all rural South Carolinians access to affordable basic local exchange service."); TR at 186 ("The selective provision of service by TWCIS will likely have an adverse impact on the availability of affordable local exchange service particularly in areas served by rural telephone companies."); TR at 191 ("[A]pproval of this petition could result in small savings to less than 7% of [Home

Telephone Company's] subscriber base. However, the net result could be in the form of increased rates to the remaining 93%.").

Furthermore, even Ms. Patterson's testimony standing alone is not convincing on this point. For example, when Ms. Patterson was asked in her pre-filed testimony whether the issuance of an amended certificate to TWCIS would be in the public interest, her response focused on TWCIS' provision of competitive facilities-based local telephone service to residential end users in the RLECs' service areas. See TR at 21, 26. Yet, according to Ms. Patterson's own testimony, that is not the service for which TWCIS was seeking certification in this proceeding. TR at 30 ("Nonetheless, we are here today to seek full CLEC authority to provide different services than those VoIP services."). Such circular logic was properly rejected by the Commission, and the Commission correctly found that there was a lack of proof with respect to the original Application.

3. Contrary to TWCIS' assertion, the records are not identical in the ALLTEL and RLEC certification proceedings.

TWCIS asserts that because its application was approved in the ALLTEL proceeding, the Commission acted arbitrarily in denying its request in *this* proceeding. Specifically, TWCIS asserts that the Commission erred in failing to follow its own precedent because the records upon which the Commission based its decisions were identical in both proceedings. In support of this proposition, during the hearing in this appeal, TWCIS cited a 1992 decision issued by the South Carolina Court of Appeals that stated that although "[a]n administrative agency is generally not bound by the principle of *stare decisis*," it nevertheless "cannot act arbitrarily in failing to follow established precedent." See 330 Concord St. Neighborhood Ass'n v. Campsen, 309 S.C. 514, 517, 424 S.E.2d 538, 540 (1992). TWCIS' assertion that the records are identical is simply not true, and this opinion actually serves to support the Commission's differing decisions. In 330

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Concord St. Neighborhood Ass'n, although the South Carolina Court of Appeals found that two separate administrative decisions dealt with the same subject matter, the court went on to note that the two records actually contained "distinguishing factors" and thus determined that the administrative agency's prior decision had *no* precedential effect on the case <u>sub judice</u>. As such, the court found that the agency did not act arbitrarily. <u>Id</u>. at 517-18, 424 S.E.2d at 540.

Similarly, the records at issue in this case contain distinguishing factors. For instance, the testimony and evidence before the Commission in the ALLTEL proceeding was not identical to that before the Commission in the RLEC proceeding. The Commission merely allowed the testimony as presented by one TWCIS witness (Julie Patterson) in the RLEC proceeding to be incorporated into the ALLTEL proceeding. Ms. Patterson's testimony in the ALLTEL proceeding, and upon which the Commission based its decision in *that* case, related only to the application to serve ALLTEL's areas and not the RLECs' areas. In addition to dissimilar records, the two proceedings materially differed in other, noteworthy ways. With respect to the ALLTEL proceeding, neither SCTC nor RLECs were a party to that proceeding. The fact that the nature of the proposed services was not questioned in the ALLTEL proceeding does not lead to a definitive determination in this proceeding.

The two applications involved disparate geographic areas. Moreover, the two proceedings were postured differently in that ALLTEL did not oppose TWCIS' application to serve in its areas and did not present any witnesses before the Commission. In the RLEC proceeding, however, the RLECs presented two credible witnesses who cogently testified as to specific evidence showing that TWCIS' Application in the RLEC proceeding did not meet the statutory requirements. None of this testimony was presented or adopted in the ALLTEL proceeding. The Commission's decision to deny TWCIS' Application in the RLEC matter is not

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an example of an administrative agency simply failing to follow its own rules or precedent, and the Commission did not apply differing standards so as to act inconsistently. Any appearance of arbitrariness is dispelled where the findings are based on distinguishing evidence. See 330 Concord St. Neighborhood Ass'n, 309 S.C. at 517-18, 424 S.E.2d at 540. With respect to the RLEC and ALLTEL applications, the Commission reviewed the *entire* evidence, as presented in the two separate proceedings, and made its findings of fact and conclusions of law based upon its review and consideration of the respective records. The record of the ALLTEL proceeding is not at issue here, and ample evidence exists to show that the Commission did not act arbitrarily in the RLEC matter.

B. The Commission Did Not Err in Finding TWCIS Did Not Need a Certificate in Order to Request Interconnection.

TWCIS argues that the Commission violated state and federal law in finding that TWCIS was not required to obtain a Certificate in order to seek interconnection with RLECs. TWCIS' argument is without merit. First, the Commission's statement that TWCIS did not need a certificate in order to request interconnection is not central to the Commission's holding in this matter. The Commission denied TWCIS' Application because it did not clearly articulate the services for which certification was sought. Thus, any statement regarding whether or not TWCIS "needs" a certificate in order to obtain interconnection is irrelevant. Second, TWCIS' own testimony was that it did not need a certificate to provide the VoIP services described in its Application.

As discussed above, in its original Application TWCIS requested certification so that it could provide end-user VoIP services. Later, in the subsequent hearing on the Application, TWCIS testified that it did not need a Certificate with respect to those services. TR at 29 ("We do have a retail VoIP based service offering which we brand as Digital Phone that we believe is

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subject too the preemption of state tariffing and certification requirements."). TWCIS relied upon a decision issued by the Federal Communications Commission, which is currently on appeal, in arguing that the Commission did not have jurisdiction to issue a Certificate or regulate with respect to those services. See In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Util. Comm'n, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, FCC 04-267 (rel. Nov. 12, 2004) (Vonage Order) (preempting a state commission's certain regulatory treatment over Vonage's VoIP service).

TWCIS' reliance on S.C. Code Section 58-9-280(C)(1) in arguing that interconnection can only occur between *certificated* local telephone service providers is misplaced. First, as noted above, the Commission denied TWCIS' Application because it did not clearly articulate the services for which certification was sought. In addition, the cited statute states that its provisions "shall be consistent with applicable federal law." *Id*.

Section 251 of the federal Telecommunications Act of 1996 ("the Act") establishes the interconnection obligations of telecommunications carriers. See 47 U.S.C. § 251(a)(1) (telecommunications carriers have an obligation to interconnect with the facilities and equipment of other telecommunications carriers); 47 U.S.C. § 251(c)(2) (incumbent local exchange carriers have an obligation, in the absence of a rural exemption, to provide interconnection for the facilities and equipment of a requesting telecommunications carrier) (emphasis added). Federal law defines a "telecommunications carrier" as a provider of a "telecommunications service," 47 U.S.C. § 153(44). It is unsettled law as to whether the end-user VoIP service that TWCIS intends to provide in the RLEC areas is a "telecommunications service," triggering any interconnection obligations under the statute. See Notice of Proposed Rulemaking, IP-Enabled



Services, 19 FCC Rcd 4863 (2004); <u>Vonage Order</u> at fn 46 ("We do not determine the statutory classification of Digital Voice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future."). TWCIS has made it abundantly clear that its position is that the proposed VoIP service falls outside of the Commission's regulatory jurisdiction because of the FCC's ruling in <u>Vonage</u>. TR at 16 ("[T]he Vonage Order preempts the state from imposing certification and tariffing requirements..."). As the Commission explained in its Order, if TWCIS is a telecommunications carrier offering a telecommunications service, then it is entitled to interconnection under Section 251 of the Act and would not need the "blessing" of the Commission to do what it is otherwise entitled under applicable federal law. Order No. 2005-484 at 5-6.

TWCIS relies upon language contained in interconnection agreements of carriers other than RLECs to support its contention that it needs a certificate in order to obtain interconnection with the RLECs. TWCIS Petition for Judicial Review ¶ 18 at pp. 7-8. This assertion is misleading. The language to which TWCIS refers simply provides that if a requesting interconnection carrier falls under the Commission's jurisdiction but has not yet been certificated, the incumbent local exchange carrier providing interconnection will not operate under the executed agreement until appropriate certification has been obtained. As such, the Commission did not err as a matter of law in denying TWCIS' Application.

C. The Commission Did Not Rule that TWCIS Must Terminate Rural Exemptions Before Providing Service, As TWCIS Asserts.

TWCIS asserts the Commission held that TWCIS should have sought to "pierce" the rural exemptions of the RLECs in the certification proceeding. This position is factually incorrect and is not reflected in the Commission's order denying certification. Although the Commission, in Order No. 2005-412, made a reference to rural exemption waivers, it

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nevertheless clarified its position in its Order Denying Rehearing or Reconsideration. Order No. 2005-484 at 4 ("This Commission merely noted [in Order No. 2005-412] that the rural exemptions were not at issue and made it clear that the order should not be read to waive or terminate those exemptions."). The Commission's reference to the rural exemptions was intended to make unmistakably clear that no termination of rural exemptions was being requested or at issue in the proceeding. This is an undisputed point. TR at 6 ("But, we're not asking, it is not an issue before you today, as to whether the rural exemption will continue or not. We're not asking that the rural exemption be set aside. Those companies have not invoked the rural exemption. The process, we're at an earlier stage in the process, and we may never get to the question of the rural exemption."); see also TR at 18.

D. The Commission's Decisions Do Not Prohibit or Have the Effect of Prohibiting the Ability of Any Entity to Provide Telecommunications Services in the RLEC Areas.

TWCIS also contends that the Commission's denial of a Certificate in the RLEC areas has the effect of prohibiting TWCIS from providing telecommunications services in those areas in violation of Section 253 of the Act because it is, in effect, allowing RLECs to "choose" when they interconnect with other carriers. This contention has no merit. Federal law provides that "[n]o State ... may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service*." 47 U.S.C. § 253(a) (emphasis added). Based upon the evidence before it, the Commission acted appropriately and within its authority, and its decisions do not constitute a "barrier to entry." As discussed above, TWCIS has made it clear that it believes the end-user VoIP service it intends to provide in the RLEC areas is not within the Commission's regulatory jurisdiction. As such, if it is entitled to do so, TWCIS may request interconnection without having to obtain additional authority from the Commission and, therefore, no barrier to entry has occurred. On the other hand, if it is not a telecommunications

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carrier with respect to those services, then Section 253 does not even apply.

CONCLUSION

Ample evidence exists to show that TWCIS failed to make a proper evidentiary showing before the Commission to justify granting of a certificate, and the Commission did not err, in violation of state or federal law, in denying TWCIS' Application. Therefore, the Commission did not abuse its discretion and properly denied TWCIS' request for the reasons set forth herein.

IT IS THEREFORE ORDERED that the Commission's orders are affirmed.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.

Presiding Judge, Fifth Judicial Circuit

February 5, 2007 Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA In The Court of Appeals

APPEAL FROM RICHLAND COUNTY Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2005-CP-40-5687

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	Petitioner,
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phone Co., Telephone ition; and	Respondents.
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I, Toni C. Hawkins, a paralegal with the law firm of Robinson, McFadden & Moore, P.C., hereby certify that I have this day caused the **Notice of Appeal on behalf of Time Warner Cable Information Services (South Carolina), LLC** in the foregoing matter to be served upon the persons named below by the method indicated this 9th day of March, 2007:

Honorable Barbara A. Scott Richland County Clerk of Court 1701 Main Street, Rm 205 Columbia, South Carolina 29201 (via hand delivery) M. John Bowen, Jr., Esquire Margaret M. Fox, Esquire McNair Law Firm, P.A. P.O. Box 11390 Columbia, SC 29211 (via US Mail)

Florence Belser, General Counsel Office of Regulatory Staff Post Office Box 11263 Columbia, SC 29211 (via US Mail)

Charles Terreni, Chief Clerk of the Commission Public Service Commission of SC PO Drawer 11649 Columbia, SC 29211 (via US Mail)

Dated at Columbia, South Carolina this 9th day of March, 2007.

Toni C. Hawkins

Doni C Hawkins